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Nos. 78-1169, 78-1286

In the

Supreme Court of the United States

LINCOLN AMERICAN CORPORATION, LINCOLN AMERICAN LIFE INSURANCE COMPANY, CONSUMERS NATIONAL CORPORATION, RICHARD F. KEATHLEY, IRVING L. BERNSTEIN, ROBERT E. KELLY, SEYMOUR ROSENBERG and JACK WILDER,

Petitioners,

vs.

MICHAEL SUSMAN,

Respondent.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,

Petitioners,

vs.

ANN FLAMM and ARNOLD FLAMM,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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The opinion of the Court of Appeals in both of these cases is reported at 587 F.2d 866. These two matters were consolidated in the Court of Appeals for argument and decision. The opinions of the district court (B1-B2 and B4-B12, App. 78-1169) are unreported.

JURISDICTION

The judgment of the Court of Appeals in these cases was entered on October 23, 1978, and petitions for rehearing and rehearing en banc were denied on December 5, 1978. The petition for writ of certiorari was filed in No. 78-1169 on January 26, 1979, and the petition for writ of certiorari in No. 78-1286 was filed on February 17, 1979. The jurisdiction of this court is based on 28 U.S.C. §1254(1). Extensions of time were granted in each case to file this brief in opposition until March 21, 1979.

QUESTIONS PRESENTED

Whether, despite the pendency of a motion for class certification, a defendant by voluntarily tendering monies sufficient to satisfy the individual plaintiffs' monetary damages and with the sole purpose of mooting the action is able thus to destroy the controversy so as to deprive the court of jurisdiction to consider the then pending class motion.

STATEMENT IN OPPOSITION

I.

Both of these cases arise under the federal securities laws.* Although unrelated, both cases were assigned to

* In No. 78-1286, plaintiffs Arnold Flamm and Ann Flamm as record owners of shares of Microdot Corporation had sought class treatment on behalf of a class of persons consisting of all persons who had sold Microdot common stock during a specific period of time. Generally, they alleged that during this time period, Microdot was resisting the prospect of an unfriendly tender offer, and courting a friendly offer. Despite this, through a series of announcements it denied any negotiations or approaches from the friendly offeror and in fact declared

the same district court judge and both had pending motions for class certification when the defendants in each case attempted to tender to the plaintiffs an amount equal to the maximum amount of their individual monetary loss. Despite the pendency of class motions, the district court held the tenders in both cases destroyed the necessary adversariness for a case or controversy and dismissed both cases as moot. The Seventh Circuit consolidated the cases for argument and decision, and in a single decision and judgment reversed.

The Seventh Circuit held that the pending motions for certification had brought the interest of class members before the court and that the adversary relationship between the class and defendants precluded any mootness "artifically created by the defendant by making the named plaintiff whole." A. 5, App. 78-1169; 587 F.2d at 869. It noted that for the class action mechanism to work the district courts must have a reasonable opportunity to consider a motion for certification and that if

* (Continued)

that it was idelogically and practically opposed both in fact and principle to any takeover and that it would make every effort to maintain its independence. Subsequently, a tender offer and merger were effected at a price far above market.

No. 78-1169 involves, generally, a challenge to the merger of Consumers National Corporation into a subsidiary of its majority shareholder, Lincoln American Corporation. Plaintiff had moved that the matter be maintained on behalf of all minority shareholders of Consumers National at the time of the alleged wrongdoing. This class allegedly had been denied the disclosures required by the federal securities laws as well as certain other protections. In addition, a corporate derivative claim was alleged on behalf of Consumers National.

a tender could short-circuit the process all pending class motions would be at the "mercy" of defendants, regardless of how meritorious. A. 7, App. 78-1169; Id. at 870. The Court of Appeals therefore directed that the district court consider the motion for certification before determining the effect of the tender on the case or controversy. In this, it acknowledged that certain dicta in its prior decision in *Winokur* v. *Bell Federal Savings & Loan Ass'n*, 560 F.2d 271, 277 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978), if literally read, would produce the opposite and undesirable result. Finding that *Winokur* and *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975), on which it had relied in *Winokur*, differed from the present situation in that the class motions were sub judicata here when the allegedly mooting event occurred, the Seventh Circuit held that if the proper procedure of considering the class question first had been followed, *Winokur* would not apply and so reversed and remanded for consideration of the class question.

The court of appeals' judgment has been stayed pending the present applications for certiorari.

II.

Until *Winokur*, each circuit that had considered the question had followed Federal Rule of Civil Procedure 23(c)'s dictate to decide the class motion "as soon as practicable" and concluded that defendants' attempt to moot the case did not deprive the district court of the power to certify the class. E.g. *White* v. *Matthew*, 559 F.2d 852, 857 (2nd Cir. 1977); *Shelton* v. *Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978); *Pearson* v. *Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975); *Cameron* v. *E. M. Adams Co.*, 547 F.2d 473 (9th Cir. 1976); *Basel* v. *Knehel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977). In this,

the several circuits were applying this Court's direction in *Sosna* v. *Iowa*, 419 U.S. 393 (1973), that under appropriate circumstances the pending motion to certify should "relate back" to the filing of the complaint and thereby assure the trial court a reasonable opportunity to fulfill its obligations under Rule 23.

In *Winokur* v. *Bell Savings & Loan Ass'n*, 560 F.2d 271 (7th Cir. 1977), the Seventh Circuit, in dicta, appeared to depart from this principle. *Winokur* itself involved a tender after the class had been denied and no class motion pended. However, the Seventh Circuit did suggest that when there had been no determination that an action be maintained as a class action, adjudication was not appropriate when "the controversy between the named party in his own interest and his opponent dies." 560 F.2d at 277. All that occurred in the instant case is that the Seventh Circuit disavowed this dictum when faced with an actual attempt by defendants to "short-circuit" the class litigation by tendering to named plaintiff while the class motion was pending.

In this, the Seventh Circuit had the benefit of this Court's recent decision in *Swisher* v. *Brady*, ... U.S. ....., 98 S.Ct. 2699 (1978), in which this Court instructed that in cases where mootness problems are likely to arise, the district court should "heed strictly" the requirements of Rule 23(c) (1) and determine class status as soon as practicable. With the Seventh Circuit now in line with all circuits that have considered the question and the apparent anomaly created by the Seventh Circuit's dicta in *Winokur* eliminated, review by this Court would not seem necessary.

This Court has recently granted review in two cases which raise the question of continued viability of an ac-

tion after the named plaintiffs' claim is mooted. But in both cases — *United States Parole Commission* v. *Geraghty,* No. 78-572, and *Deposit Guaranty National Bank* v. *Roper,* No. 78-904—the district court had considered and denied the class motion before the allegedly mooting event occurred. In this posture these cases raise questions addressed but not squarely decided by this Court in a line of cases beginning with *Sosna* v. *Iowa,* supra, and continuing through *Swisher* v. *Brady,* namely, whether after class status has been denied, the interest of the putative class members in appellate review of the ruling (or reconsideration by the trial court) is sufficient in light of the circumstances of the case to constitute a continuing case or controversy. The present cases, where the allegedly mooting event occurred when the class motion was pending, simply does not pose these or related questions.*

The conflict which defendants would find between the present decision and cases of other circuits does not withstand examination. In *Bradley* v. *Housing Authority,* 512 F.2d 626 (8th Cir. 1975), decided before *Swisher,* the district court was unable to heed Rule 23's instructions to decide the class motion because of the lack of time. The Eighth Circuit, in affirming the dismissal for lack of a continuing controversy, was obviously impressed with the fact it was defendant's purposeful act in tendering plaintiff and intervenors the apartments they sought as

* In addition, in *Roper,* after the class was denied, defendants made an offer of judgment which was entered over plaintiffs' objection. *Roper* v. *Conserve, Inc.,* 578 F.2d 1106, 1109 (5th Cir. 1978). See also *Cameron* v. *E. M. Adams Co.,* 547 F.2d 473 (9th Cir. 1976), where a tender after class was denied led to entry of judgment for plaintiff over objection. Here, in contrast, the judgment was not for plaintiff but merely dismissed the matter on grounds of mootness.

arguing against mootness. However, the federal regulations under attack had been substantially changed since the case was filed, and the Eighth Circuit concluded that under all the circumstances it would be more efficient to institute a new action rather than remand for class determination a case that plaintiff might well choose not to pursue. *Vun Cannon* v. *Breed,* 565 F.2d 1096 (9th Cir. 1977), has even less relevance to the present disputes. The court there explicitly noted that plaintiff had at no time moved the court for certification and reserved the question of what the effect would be of an attempt to moot the individual plaintiff's claim while he was attempting to obtain certification. 565 F.2d at 1101 n.7.

All that the present cases involve is an application of *Swisher's* injunction to heed Rule 23's direction to decide the class motion as soon as practicable. In directing the district courts to undertake this task before considering defendants' attempt to moot out the individual plaintiff, the Seventh Circuit was merely returning to the uniform position of the other circuits and retreating from its anomalous ruling in *Winokur.* Review by this Court would not seem warranted.

III.

In holding in the *Lincoln American* case, No. 78-1169, that the merger of the derivative plaintiff corporation into its parent (both Delaware corporations) did not extinguish the derivative plaintiff's cause of action against third parties, the Seventh Circuit applied Delaware corporation law. The interpretation and application of this matter of state law does not raise questions that require this Court's review.

CONCLUSION

For the reasons here stated, it is respectfully submitted petitions for writ of certiorari should be denied.

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